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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MELISSA JOHNSON, an infant, by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the intentional tort exception to the Federal Tort Claim Act bars an action against the government by a five-year old girl who was sexually molested by a letter carrier, known by the Postal Service to have previously sexually molested children, where, despite such knowledge, the Postal Service not only continued the employment of the letter carrier, but assigned him to a residential mail delivery route where contact with young children was a certainty.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

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MELISSA JOHNSON, an infant, by
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Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Melissa Johnson, an infant by Barbara Johnson, her mother and natural guardian, and Barbara Johnson, individually, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A1-A24) is reported at 788 F2d. 845. The opinion of the district court (App. D, infra, A29) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra, A25) was entered on April 8, 1986. A petition for rehearing was denied on May 13, 1986, (App. C, infra, A27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against

the United States for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: PROVIDED, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of enactment

> of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violation of Federal Law.

STATEMENT

On June 3, 1982, Melissa Johnson, who was then five years old, was sexually molested by a letter carrier, Luis Ojeda, employed by the United States Postal Service. Melissa's mother, Barbara Johnson, later learned during the course of the criminal investigation that Ojeda had previously sexually abused children, and that the Postal Service had been aware of these previous incidents at the time it assigned Ojeda to the Johnson neighborhoor. (Document No. 18 of Record below, App. G, infra at A40.)

Following the filing of a timely claim under the Federal Tort Claims Act (FTCA), Barbara and Melissa Johnson filed suit (App. H, Complaint, infra at A43) in the federal district court of the Eastern District of New York, Eugene H. Nickerson, Judge. The district court ruled that it lacked subject matter jurisdiction of the claim because of deficiencies in the contents of the administrative claim. A motion for reconsideration was denied for lack of jurisdiction because a Notice of Appeal had been filed. App. F, infra at A38.

The Court of Appeals held that the claim met the requirements of the statute and that the district court erred in this respect. However, it concluded, Judge Pratt dissenting, that the district court lacked subject matter jurisdiction

over the suit for a different reason--that it "arise[es] out of" an assault and battery and is therefore barred by 28 U.S.C. 2680(h).

The Court of Appeals relied upon what it labeled "the plain language" of the statute and "avoiding exposure of the United States to liability for excessive or fraudulent claims," in concluding that the claim was barred. In dissent, Judge Pratt stated:

> In my view a proper interpretation of the FTCA, consistent with its broad and remedial purpose, would be to hold the government liable as would be a private person, when its supervisors negligently hired an assaultive employee, assign him to an area of temptation, and negligently fail to foresee and prevent the harm he is likely to inflict on the public. In practical terms, liability in such a situation would create no problems that are distinguishable from many other claims for which the government routinely

> is held liable. Claims for negligent supervision are no more prone to exaggeration and no more difficult to defend than most automobile accidents; the absence of a jury leaves the case under the firm control of a federal district judge; and punitive damages are not available, 28 U.S.C. §2674. In short, on this issue I agree with the majority opinion of the third circuit in Shearer v. United States, 723 F.2d 1102, 1107-08 (3rd Cir. 1983), that the intentional tort exclusion of section 2680(h) was not intended to apply to a case of this type.

The Court of Appeals denied rehearing en banc. Appendix C, infra at A27.

REASONS FOR GRANTING THE PETITION

1. Conflict among the Circuits

The issue presented in this case was before this Court, and left unresolved in United States v. Shearer, ___ U.S. ___ , 105 S. Ct. 3039 (1985), rev'g 723 F.2d 1102 (3d Cir. 1983).*

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* The Third Circuit held that the assault exception to governmental liability under the Federal Tort Claims Act did not bar an action by the survivor of a murdered serviceman whose assailant, also a serviceman, was known by his supervisors to be homicidal, where the supervisors negligently took no action to protect or warn plaintiff's decedent.

The Third Circuit holding on the Federal Tort Claim Act issue was left standing by an evenly-divided Court (Justice Powell not participating), but the Third Circuit's judgment in Shearer was reversed by this Court on other grounds.

The Third Circuit in Shearer, and other federal courts have squarely permitted claims of negligence against the government where an assault was the natural consequence of the negligence of a governmental employee. See, e.g. Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); DeLong v. United States, 600 F. Supp. 331 (D. Aka. 1984); Luizzo v. United States, 508 F. Supp 923 (E.D. Mich. 1981). Loritts v. United States, 489 F. Supp. 1030 (D. Mass 1980); Bryson v. United States, 463 F. Supp. 980 (E.D. Pa. 1978). A plurality of this Court in Shearer, and a number of courts of appeals, have found §2680(h) a bar to such suits. See, e.g., Hughes v. United States, 662 F.2d 219 (4th Cir. 1981); Naisbitt v. United States, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); United States v. Shively, 345 F.2d 294 (5th Cir. 1965).

Petitioner's claim in this case is cognizable under the Third Circuit's holding in Shearer.* The claim here, as

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* The court below stated in dictum that petitioners' complaint failed to meet the requirements of Shearer because the allegation of governmental knowledge of the mailman's perversions was "based on pure speculation. Otherwise, the essential facts would have been alleged." If the issue of the sufficiency of the Complaint is dispositive, plaintiffs must be given the opportunity to replead before the Complaint is dismissed on that ground. Ballon v. General Elec. Co., 393 F.2d 398 (1st Cir. 1968). The allegation was not based on pure speculation, as Document No. 18 of the Record, App. G. infra at A40, shows. If given the opportunity to replead, plaintiffs could "allege sufficient independent facts to demonstrate that the government knew or should have known that the employee was dangerous prior to the injurious act." Shearer v. United States, supra, 723 F.2d at 1107, citing Gibson v. United States, 457 F.2d 1391, 1395-96 (3d Cir. 1972), cited by the Second Circuit in the instant acase, Slip. op. at A1.

in Shearer, has its roots in governmental negligence. Negligence is not a remote cause of the plaintiffs' injuries nor is a negligence issue created through artful pleading. The Postal Service knowingly continued to employ a sex-abuser of children and sent him out on his official rounds into a residential neighborhood. The sexual assault committed by the letter carrier against Melissa Johnson was the "natural result," indeed, the inevitable result, of the government's negligence.

2. NATURE OF THE GOVERNMENTAL NEGLIGENCE.

Unlike Shearer, in which the government's negligence consisted of solely of "negligent acts of omission,"*

* Brief in the United States Supreme Court, for the Respondent Louise Shearer at 10. (Dock No. 84-194.)

the government here facilitated petitioners' injuries by committing acts that set the stage and made the sexual abuse possible--it clothed (in both senses of the word) a known sex abuser of children in a uniform of the United States government, garments of trust and responsibility, and sent him into a residential neighborhood where his inevitable victims, children, would view him not as a stranger to be wary of, but a trusted member of the neighborhood.

The unique nature of the governmental negligence distinguishes this case from Shearer. Negligence that went beyond a mere general failure to supervise also persuaded the court in DeLong v. United States, supra, to permit an action despite §2680(h). In DeLong, Marine guards had not been informed that plaintiffs had permission to be in a restricted area, and

the guards struck, kicked and otherwise injured plaintiffs. In permitting the action, the court drew a crucial distinction:

> In the case at bar, the plaintiffs do not merely allege a general failure on the part of government officials to supervise the marine guards. Instead, the claim is that higher government officials failed in their specific responsibility to notify the guards that civilian workers would be in the restricted area. This allegation of specific acts or omissions by higher officials is quite separate from allegations of assault committed by the marine guards. This fact situation distinguishes the case before me from many of the cases in which suit was barred.
>
> 600 F. Supp. at 338.

3. Legislative History

The FTCA excludes from coverage "any claim arising out of assault, battery..." Every thoughtful judicial opinion on the scope of this exclusion includes a review of its legislative history and a

conclusion regarding Congressional intent. As this Court's plurality opinion in Shearer correctly states, "The legislative history of §2680(h)...[is] sparse..." 105 S. Ct. at 43. This Court also stated in Shearer that the legislative history "is entirely consistent with our interpretation," id., a claim that accurately could be made by proponents of either side of the issue. In enacting §2680(h), Congress plainly never contemplated cases like Shearer or the instant case. As this Court noted in Shearer, the typical factual situation which Congress intended to be barred by §2680(h) was "where some agent of the government gets in a fight with some fellow...[a]nd socks him." Tort Claims: Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 33 (1942), This example, devoid of any legal

subtlety or factual complexity, tells us nothing about Congressional intention in the kind of case presented by Melissa Johnson.

This Court also stated in Shearer:

> It is clear that Congress passed the Tort Claims Act on the straight forward assurance that the United States would not be financially responsible for the assaults and batteries of its employees. No one suggested that liability would attach if the government negligently failed to supervise such an assailant.
>
> United States v. Shearer, supra, 105 S. Ct. at (Citations omitted).

These assertions are plainly correct, but they beg the question, for no one suggested that liability would not attach for negligent supervision--

the question simply never came up.*

The Second Circuit in this case and this Court in Shearer, looked to the plain language of §2680(h) in order to discern its scope. This Court concluded that the phrase "arising out of assault [or] battery" is "broad enough to encompass claims sounding in negligence." 105 S. Ct. at 43. Even if it is, the approach is inadequate; for the same "plain meaning" is also broad enough to encompass claims of governmental negligence which leads to assaults committed by persons other than government employees, and yet such claims have been permitted with this Court's

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* It is not surprising that the question did not come up at that time--the doctrine of employer liability for negligent supervision of employees as opposed to respondeat superior liability, was virtually unknown at the time.

approval, despite the language of §2680(h). Panella v. United States, 216 F.2d 622 (2d Cir. 1954), cited with approval, United States v. Shearer, supra, 105 S. Ct. at

Neither the legislative history of §2680(h)* nor the plain meaning of the language itself yields an answer to the question presented here. As the Fifth Circuit noted in its analysis of whether an accident "arose out of" the operation of a tractor or a trailer:

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* The only pertinent legislative history lacks focus. At a hearing of the House Judiciary Committee, the Justice Department spokesman told the panel that the exception would bar suits remedying "deliberate assault", but not those based on "negligent assaults". See Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 33-34 (1942). The spokesman concluded that "[a]n injury caused by negligence could be considered under the bill" Id.

> Where a truck and towed trailer are involved in an accident, the courts are well-advised to avoid the metaphysics and hold that the accident arose out of the use of each.
>
> Blue Bird Body Co. v. Ryder Truck Rental, 583 F.2d 717, 727 (5th Cir. 1978).

Here, if the action arises out of both negligence (permitted) and assault (barred), a determination must be made as to the dominant or central character of the action. Where the crux of the claim is assault and issues touching upon assault--intention, consent, whether there was an assault, the gravity of the assault, the nature of the assault, then it may be concluded that §2680(h) bars the action. But here, assault is an incidental factual component of the claim; the essence of the claim is negligence.

The critical issues, the gravamen of the complaint, concern the actions or failures to act of the Postal Service employees who hired and supervised Ojeda--what did they know, what should they have known, what assignments did they consider for him, what oversight did they provide, what complaints did they receive about him, what did they do about them, what should they have done about them? In short, Melissa Johnson's complaint is essentially about negligence, and not about assault. Because §2680(h) bars actions arising out of assault, this claim, which essentially arises out of negligence, should be permitted.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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July, 1986

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 939—August 1984 Term

Argued: April 8, 1985 Decided: April 8, 1986

Docket No. 84-6335

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MANSFIELD, KEARSE and PRATT,

Circuit Judges.

Appeal from a judgment of the Eastern District of New York, Eugene H. Nickerson, *Judge*, dismissing plaintiffs' claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, for lack of subject matter jurisdiction due to inadequate presentation of the claims to the appropriate agency, as required by 28 U.S.C. § 2675.

Affirmed. Judge Pratt dissents in a separate opinion.

KATHLEEN PERATIS, Esq., New York, NY (Richard Frank, P.C., New York, NY, of counsel), *for Appellants*.

KEVIN P. SIMMONS, Assistant U.S. Attorney, Brooklyn, NY (Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, Miles M. Tepper, Assistant U.S. Attorney, Brooklyn, NY, of counsel), *for Appellee*.

MANSFIELD, *Circuit Judge*:

Barbara and Melissa Johnson, mother and daughter respectively, appeal from a judgment of the Eastern District of New York, Eugene H. Nickerson, Judge, dismissing their claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq*. The Johnsons seek damages stemming from the United States Postal Service's alleged negligence in

the employment and supervision of a letter carrier who sexually assaulted the infant Melissa. Judge Nickerson ruled that the court lacked subject matter jurisdiction because the plaintiffs failed to comply with 28 U.S.C. § 2675(a),[1] which requires that claims against the United States be presented to the appropriate agency before an action may be maintained. We hold that the Johnsons' claim met the requirements of the statute and that the district court erred in this respect. However, we conclude that the district court lacked subject matter jurisdiction over the suit because it "aris[es] out of" an assault and battery and is therefore barred by 28 U.S.C. § 2680(h).[2] Accordingly, we affirm.

On October 3, 1983, Barbara Johnson submitted a claim to the Postal Service for injury and damages, utilizing the appropriate one page standard form prepared by the federal government. *See* 28 C.F.R. § 14.2

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1 28 U.S.C. § 2675(a) provides in pertinent part:

> "**§ 2675. Disposition by federal agency as prerequisite; evidence**
>
> "(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."

2 28 U.S.C. § 2680 provides in part:

> "**§ 2680. Exceptions**
>
> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: . . . ."

(1985). In response to question 11, which requires the applicant to "[s]tate below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof" she stated that on June 3, 1982 "and various dates prior thereto"

> "Melissa Johnson was sexually molested assaulted and, on information and belief, sodomized and threatened by Postman Luis Ojeda.
>
> "Barbara Johnson sustained damage for medical and psychological treatment and loss of services."

The claim further stated that Melissa Johnson suffered "vaginal and genital injuries, psychiatric and emotional injuries [of which the] full nature and extent [are] unknown at present." It stated that Barbara Johnson incurred "expenses for medical and psychological treatment" and suffered "loss of services". The Johnson's sought $6,000,000.

By letter dated January 6, 1984, the Postal Service denied the claim. First, the agency maintained that Ojeda acted outside the scope of his employment in assaulting Melissa Johnson. Second, the letter stated:

> "The incident you describe as the basis of your claim is an assault and battery. While Congress has generally waived the Government's immunity for certain wrongful acts of its employees commited [sic] within the scope of their employment, Congress has specifically provided, in *28 U.S.C. § 2680(h)*, that the Government's immunity from suit and from considering claims for personal injury has not been waived for any claim arising out of an assault and battery." (Emphasis in original).

On April 4, 1984, plaintiffs filed the complaint in this action, alleging that the sexual assault on Melissa was "caused by the carelessness, recklessness and negligence of the defendant, its agents, servants and/or employees" in their "employment, supervision and assignment of Ojeda". Although plaintiffs alleged generally that the defendant and its agents acted "with notice or knowledge of Ojeda's criminal and perverted propensities and tendencies" no facts supporting these assertions or further specification were provided in the complaint.

Defendant moved to dismiss the complaint for lack of subject matter jurisdiction, contending that the United States had not waived its sovereign immunity in this case because it was one "arising out of" assault or battery. 28 U.S.C. § 2680(h) provides a number of exceptions to the broad waiver of sovereign immunity embodied in the FTCA, including a bar on suits "arising out of assault [and] battery." Judge Nickerson granted the motion but did not address the grounds proffered by defendant. Instead, the district court ruled that the claim raised by the complaint had not been submitted to the Postal Service as required by 28 U.S.C. § 2675(a). The court noted that, although the complaint alleged negligent supervision, the administrative claim made no mention of such a legal theory or of facts suggesting that "anyone other than Ojeda might be culpable for the[ ] injuries".

DISCUSSION

Sufficiency of the Administrative Claim

Appellants contend that the administrative claim filed with the Postal Service, alleging only sexual assault and injuries stemming from it, was sufficient to enable them

to maintain a court action against the United States for negligent supervision. 28 U.S.C. § 2675(a) makes the filing of a claim with the appropriate agency a prerequisite to jurisdiction of the courts. As we have stated

> "Section 2675 is designed, in conjunction with Section 2672, to provide a procedure under which the government may investigate, evaluate and consider settlement of a claim. This purpose requires that the Notice of Claim provide sufficient information both to permit an investigation and to estimate the claim's worth." *Keene Corp. v. United States*, 700 F.2d 836, 842 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1984); *see Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir. 1985); *Bush v. United States*, 703 F.2d 491, 493-94 (11th Cir. 1983); *Douglas v. United States*, 658 F.2d 447, 447 (6th Cir. 1981); *Adams v. United States*, 615 F.2d 284, 289 (5th Cir.), *clarified*, 622 F.2d 197 (5th Cir. 1980).

Thus, an administrative claim need not meet formal pleading requirements. All that is necessary is that a claim be specific enough to serve the purposes intended by Congress in enacting § 2675(a)—"to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Congress, 2d Sess. 2 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News ("USC CAN") 2515, 2516. Toward this end, the government requires all claimants to submit Standard Form 95, a one page claim form requesting a "description of accident" and the "nature and extent of injury".

Appellants' administrative claim met these requirements. By stating the cause of the injury, the name of the employee who committed the assault, and the date and location of the attack, the claim notified the agency of sufficient factual circumstances to enable it to investigate the matter. Although the claim supplied no facts evidencing negligent supervision and did not allege all the factual elements of such a theory of liability, a reasonably thorough investigation of the incident should have uncovered any pertinent information in the government's possession relating to the agency's knowledge, or lack of knowledge, of any prior sexual misconduct by its employee Ojeda. *See Rise v. United States*, 630 F.2d 1068 (5th Cir. 1980) (administrative claim alleging negligent failure to diagnose and treat illness sufficient to maintain action for negligent referral to private hospital and failure to supervise treatment).

A more difficult issue is presented by Judge Nickerson's conclusion that the claim was inadequate because, as submitted, it alleged only assault, a tort clearly barred by § 2680(h), and therefore the agency could have reasonably refrained from investigating the claim at all. Although this position might have some logic if the claimant were to be held strictly to principles of common law pleading we believe that a more liberal standard was intended. In enacting § 2675(a) Congress was aware that the Postal Service was one of the few agencies that dealt with the vast bulk of claims against the federal government and had acquired familiarity with the task of settling tort claims, S. Rep. 1327, *supra*, at 3, USCCAN *supra*, at 2517. Given this familiarity, and the well settled principle that legal theories need not be submitted to the agency, *Broudy v. United States*, 722 F.2d 566, 568-69

(9th Cir. 1983); *Rise*, *supra*, 630 F.2d at 1071, the agency could reasonably be required to have anticipated that appellants' claims encompassed recovery based on negligent supervision and to conduct an investigation accordingly.

The alleged conduct of the postal employee should normally have prompted an inquiry into the Postal Service's prior knowledge of his propensities since experience indicates that it is the kind of conduct that may be repetitive. Section 2675(a) does not require formal pleadings or that a valid legal claim be alleged but only "the basic elements of notice of accident and injury and a sum certain representing damages" so that the agency may investigate it. *Broudy*, *supra*, 722 F.2d at 568 (citing *Avery v. United States*, 680 F.2d 608, 610 (9th Cir. 1982)). Although these requirements are jurisdictional and must be adhered to strictly, *Keene*, *supra*, 700 F.2d at 841, the district court erred in extending them to require that a ground of liability cannot be maintained unless factual elements uniquely related to that theory were first presented in the administrative claim.

Our decision of this issue accords with that of other courts which have held that claims stating plainly-barred causes of action may nevertheless be sufficiently described under § 2675(a) to permit claimants to maintain suits on alternative theories of liability. Thus in *Shipek*, *supra*, and *Broudy*, *supra*, the Ninth Circuit permitted widows of veterans to maintain suits against the government for failure to warn their husbands, upon discharge from military service, of the dangers of radiation exposure which occurred while the husbands were in the military. In both cases the administrative claim alleged only wrongful exposure to radiation, a claim clearly

barred by the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135 (1950) (government is immune from suit under the Federal Tort Claims Act for injuries to servicemen arising out of or in the course of activity relating to service). Nonetheless, the courts declined to require that the administrative claims state alternative theories of liability or facts related solely to such grounds and permitted the plaintiffs to maintain actions against the government.[3]

The Claim Arises Out of Assault and Battery

Although remand to the district court is usually required when its dismissal of a suit is predicated on legal error, that course is unnecessary here because the district court lacked subject matter jurisdiction to proceed with the case. Defendant's motion to dismiss contended that the Johnsons' claims fell within the FTCA's exception retaining immunity as to claims "arising out of assault [or] battery". 28 U.S.C. § 2680(h). The district court did not reach that issue. However, we address it in the first instance because it presents a question of law addressed to the jurisdiction of the district court. We conclude that the claims here "arise out of" assault and battery and are therefore excepted from the FTCA's grant of jurisdiction. 28 U.S.C. § 1346(b).

In *United States v. Shearer*, ____ U.S. ____, 105 S. Ct. 3039 (1985), Chief Justice Burger, in a portion of an opinion concurred in by three other Justices, concluded that a negligence claim of the very type asserted here

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[3] The claims relating to failure to warn, monitor and treat were not barred by the *Feres* doctrine because they claimed negligence occurring after the decedents had left the military. *Broudy v. United States*, 661 F.2d 125, 128 (9th Cir. 1981); *see Kohn v. United States*, 680 F.2d 922, 926 (2d Cir. 1982).

arises out of an assault and battery within the meaning of § 2680(h). He noted that

> "Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee. Thus 'the express words of the statute' bar respondent's claim against the Government. *United States v. Spelar*, 338 U.S. 217, 219, 70 S.Ct. 10, 11, 94 L.Ed. 3 (1949)." 105 S.Ct. at 3042. (Emphasis in original).

Four other Justices declined to join the portion of the Chief Justice's opinion addressing this issue but did not dissent from it. *Id.* at 3044. The remaining Justice did not participate in the case.

We agree with the Chief Justice that the plain language of § 2680(h) prohibits claimants from clothing assault and battery actions in the garb of negligence by claiming negligent failure to prevent the attack. *Cf. Lambertson v. United States*, 528 F.2d 441, 445 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976); *Blitz v. Boog*, 328 F.2d 596, 598-99 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964). In interpreting a statute, "[t]he starting point of our analysis is the language of the statute itself", *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 508 (1981), and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Com-*

mission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *American Federation of Labor v. Donovan*, 757 F.2d 330, 344, 350 (D.C. Cir. 1985). In this case we find the statutory language sufficiently clear to resolve the issue.

The statute's plain language, "arising out of," reflects an intent by Congress to bar a suit against the government for injuries *caused by* a government employee's commission of an assault and battery. It is equally clear that the claim here is for injuries caused by the employee's assault and battery and that, absent the assault and battery, no claim could exist. The scope of § 2680(h) is a matter of federal law. *See United States v. Neustadt*, 366 U.S. 696, 705-06 (1961). To permit such a claim to be stated in terms of a negligence theory based on prior foreseeability, *see Restatement (Second) of Torts*, § 449 (1965); *W. Prosser, Law of Torts*, § 44 at 273, 275 (4th ed. 1971), would defeat Congress' purpose in enacting § 2680(h). The claim, although stated in terms of negligence, would still be for injuries caused by and arising out of the assault and battery.

Our holding that the phrase "arising out of assault [and] battery" encompasses actions grounded on alternative theories of liability finds support in the Supreme Court's interpretation of the phrase "arising out of" as used in other exceptions of the FTCA. In *Kosak v. United States*, 465 U.S. 848 (1984), the Court interpreted § 2680(c), which bars "any claim arising in respect of . . . any detention of any goods or merchandise" as prohibiting all claims for injuries sustained during detention, including those alleging negligence. In reaching this conclusion the Court rejected the view that "arising in respect of detention" only covers claims for damage caused by the detention itself. Instead, the Court con-

cluded that "arising in respect of" is equivalent to "arising out of" and therefore should be construed as barring all claims relating to the detention of goods. *Id.* at 854. Similarly, we conclude that "arising out of assault [and] battery" bars claims where the injuries result directly from the assault and battery.

In *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954), Judge (later Justice) Harlan expressed the view that § 2680(h) bars suit when the injuries result from an assault committed by a government employee, even if the action is based on alternative legal theories. In holding that § 2680(h) does not bar suit for negligence leading to an assault by a *non-government employee*, he distinguished suits, like this one, based on assaults committed by *government employees*:

> "It is . . . important to distinguish cases in which it was sought to hold the Government liable on a negligence theory for assaults committed by *government employees*. See Moos v. United States, D.C.Minn.1954, 118 F.Supp. 275; cf. Jones v. United States, 2 Cir., 1953, 207 F.2d 563; certiorari denied 347 U.S. 921, 74 S.Ct. 518. In this case, however, a negligence action is not merely an alternative form of remedy to an action for assault but negligence is rather the essence of the plaintiff's claim.
>
> "To illustrate: in one case a person is assaulted by a government employee who becomes angered by a discussion about a matter within his jurisdiction; in another, a visitor to a government prison is assaulted by a prisoner as a result of the prison guards being improperly off duty. Since in the absence of

§ 2680(h) the assault in the first case might give rise to an action against the Government without any showing of negligence, it is not difficult to imply that the § 2680(h) exception was intended to exonerate the Government from all liability of this nature, no matter what the form of the action. But that implication is not so easily reached in the second case where the assault, absent negligence, would not give rise to any liability on the part of the Government." 216 F.2d at 624 (Emphasis in original); *see Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd on other grounds*, 374 U.S. 150 (1963).

Other courts have also rejected attempts to circumvent the assault and battery exception by framing the complaint as one for negligent supervision. Most recently, the Fifth Circuit in *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985), cited the Chief Justice's opinion in *Shearer, supra*, and concluded that claims alleging negligent failure to prevent an assault by a government employee are barred by § 2680(h). The 10th Circuit in *Naisbett v. United States*, 611 F.2d 1350, 1353-54 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980), relied on *Panella, supra*, in barring a suit for negligent supervision. The court looked to the immediate cause of the injury rather than the theory of liability and stated that "[i]n any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government." *Id.* at 1356; *see Wine v. United States*, 705 F.2d 366 (10th Cir. 1983).

In *Hughes v. Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980), *aff'd*, 662 F.2d 219 (4th Cir. 1981), the court dealt

with facts similar to those alleged here and held that § 2680(h) prohibited suit against the U.S. Postal Service for negligent supervision of a letter carrier who allegedly committed sexual assaults on two children. Although the plaintiff alleged that the service had knowledge of previous misconduct of the assailant, the court stated "there would have been no assault except for the separate and independent acts of [the assailant]. Without his independent assault, there would be no cause of action." 514 F. Supp. at 670. Thus the court applied a "but for" test to determine that the suit arose out of assault and battery and recognized that even though the plaintiff may have had a cause of action under state law against the employer for negligence, the suit was barred by the statute.[4] The Fourth Circuit affirmed "for reasons adequately stated by the district court." 662 F.2d at 220.

Courts interpreting other exceptions to the FTCA provided by § 2680 have, like the Supreme Court in *Kosak*, *supra*, adopted the view that its "arising out of" language bars suits where the prohibited claims could, in absence of the exception, have been prosecuted. *Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2d Cir. 1985)

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4 The same reasoning was adopted by the court in *Collins v. United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966). The court held that § 2680(h) blocked an action against the government for negligence in hiring and retaining a postman who allegedly "pushed, hit and struck" the plaintiff. Other courts have taken the same approach. *See. e.g.*, *Gale v. United States*, 525 F. Supp. 260 (D.S.C. 1981) (dismissing suit for negligent supervision of marine who raped plaintiff); *Taylor v. United States*, 513 F. Supp. 647 (D.S.C. 1981) (dismissal of suit for negligent failure to provide psychological treatment leading to commission of murder); *Pennington v. United States*, 406 F. Supp. 850 (E.D.N.Y. 1976) (dismissing suit claiming negligence in allowing government employee to carry a gun, even though assault was committed while the assailant was off-duty); *cf. Moffitt v. United States*, 430 F. Supp. 34 (E.D. Tenn. 1976) (permitting suit to proceed where plaintiff alleged that employee was incapable of forming the intent to commit assault and battery).

(affirming dismissal of claim for destruction of goods detained). In *Klein v. United States*, 268 F.2d 63, 64 (2d Cir. 1959), a claim for negligent exposure to the elements was held barred by § 2680(h) as "arising out of . . . false arrest" because "the alleged consequences to plaintiff directly flowed from the detention." In *Davidson v. Kane*, 337 F. Supp. 922 (E.D. Va. 1972), the court held that the false arrest provision prevented the plaintiff from maintaining a suit claiming that the arresting officers were negligently supervised. These cases demonstrate that although § 2680(h) deals primarily with intentional torts and the general policy of the FTCA is to permit negligence suits, the provision nonetheless has been interpreted to except claims based on negligence leading to intentional torts. *Cf. United States v. Neustadt*, 366 U.S. 696 (1961) (action for negligent misrepresentation barred by § 2680(h)); *Dupree v. United States*, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959) (action for negligent interference with contractual rights barred by § 2680(h)).

The meager legislative history available is consistent with the interpretation that § 2680(h) cannot be avoided merely by alleging that an assault and battery was due to negligent supervision.[5] *See Shearer, supra*, ____ U.S.

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5 The legislative history mostly consists of statements by individual congressmen or administration officials on bills which were similar to the FTCA, but were not enacted. Discussion rarely touched upon the assault and battery exception. *See Panella, supra*, 216 F.2d at 625-26 (describing the legislative history as "meagre"); *Collins, supra*, 259 F. Supp. at 364 (legislative history is not "at all helpful"). In any event, statements of individual legislators are not accorded the weight given to legislative committee reports, none of which discuss the matter at issue here. *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 585-86 (1957); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 175 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *American Airline, Inc. v. C.A.B.*, 365 F.2d 939, 949 (D.C. Cir. 1966).

____, 105 S.Ct. at 3042. No report or congressional statement suggests otherwise. One representative of the Justice Department referred to assault and battery as "torts which would be difficult to make a defense against, and which are easily exaggerated." Tort Claims Against the United States: Hearings on S. 2690 Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess. 39 (1940) (Statement of Alexander Holtzoff, Special Assistant to the Attorney General). This reference corresponds to one of the "three objectives most often mentioned in the legislative history as rationales for the enumerated exceptions [to the FTCA:] . . . avoiding exposure of the United States to liability for excessive or fraudulent claims", *Kosak*, *supra*, 465 U.S. at 858-59 & n.17.[6] This concern is warranted where negligent supervision is alleged as well as where assault and battery stand alone. Assaults due to negligence are as easy to exaggerate as assaults in general.[7]

Our interpretation of § 2680(h) has not been universally shared. In *Shearer v. United States*, 723 F.2d 1102,

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6 The other concerns are "ensuring that 'certain governmental activities' not be disrupted by the threat of damage suits" and "not extending the coverage of the Act to suits for which adequate remedies were already available." *Kosak*, *supra*, 465 U.S. at 858-59. The Senate Report accompanying the bill ultimately signed into law only refers to those two rationales. S. Rep. No. 1400, 79th Cong. 2d Sess. 33 (1946).

7 A colloquy on the assault and battery exception at a hearing of the House Judiciary Committee is singularly unenlightening. The Justice Department spokesman told the panel that the exception would bar suits remedying "deliberate assault", but not those based on "negligent assaults". *See* Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 33-34 (1942). The spokesman concluded that "[a]n injury caused by negligence could be considered under the bill" *Id.* Yet in his references to negligence, it was clear that the spokesman was referring to automobile accidents, and did not contemplate situations that interweave negligent and intentional torts.

1106-08 (3d Cir. 1983), *rev'd on other grounds*, 105 S.Ct. 3039 (1985), *supra*, a divided panel of the Third Circuit reinstated a claim that negligent supervision led to the murder of plaintiff's son by a soldier. The Court held that § 2680(h) does not bar actions where the plaintiff alleges sufficient facts "which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort." 723 F.2d at 1107.[8] Although we and at least four Supreme Court Justices disagree with the holding of the Third Circuit in *Shearer*, appellants' complaint is insufficient to survive even the test propounded by the circuit

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8 The Third Circuit majority in *Shearer* relied on *Gibson v. United States*, 457 F.2d 1391 (3d Cir. 1972), in which the court permitted suit by a plaintiff assaulted by a Job Corps trainee. It is debatable whether the assailant in *Gibson* can be considered a government employee. In any event, the *Gibson* court distinguished *Collins*, *supra*, by noting that the government had undertaken a duty of caring for and controlling the trainees, knowing of their drug addictions and instability. 457 F.2d at 1396. No such extensive duty is alleged to have been undertaken in the employment of the postal worker at issue in this case.

Several other courts have adopted the approach taken by the Third Circuit in *Shearer*. *Liuzzo v. United States*, 508 F. Supp. 923 (E.D. Mich. 1981); *Bryson v. United States*, 463 F. Supp. 908, 912 (E.D. Pa. 1978).

A number of courts have declined to apply § 2680(h) in contexts which appear similar to the facts of this case, but differ in significant respects. *Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (permitting claim that alleged negligence led to assault by non-government employee); *DeLong v. United States*, 600 F. Supp. 331, 338 (D. Alaska 1984) (distinguishing suits based on general failures to supervise employees and permitting suit based on negligent failure to perform specific acts). In *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980), the court permitted suit for negligent failure to provide security on West Point campus leading to the rape of the plaintiff by a cadet. The negligence alleged, however, was independent of the government's supervision of its employees and the fact that an employee, rather than a non-employee, committed the assault was "fortuitous". 489 F. Supp. at 1032 n.3. The situation therefore did not involve solely allegations of negligent supervision where the scope of the negligence only encompasses assault by a government employee.

court. The Third Circuit there noted that "a plaintiff cannot merely point to an assault and battery and then claim, based simply on the occurrence of the intentional tort, that the government was negligent for not having . . . anticipated the offensive action. . . . The plaintiff must allege sufficient independent facts to demonstrate that the government knew or should have known that the employee was dangerous prior to the injurious act." *Id.* (citing *Gibson v. United States*, 457 F.2d 1391, 1395-96 (3d Cir. 1972)). This requirement stems from the jurisdictional nature of § 2680(h). Because § 2680(h) is a bar to jurisdiction, facts which are claimed to circumvent application of the provision must be pleaded at the outset of the case. Therefore, even though a pleading may, in other contexts, be sufficient to prevent dismissal under Fed. R. Civ. P. 12(b)(6), a complaint brought under the FTCA must allege facts enabling the court to look beneath the language in the complaint to determine the substance of the claim. *See Emch v. United States*, 630 F.2d 523, 528 (7th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *Gaudet v. United States*, 517 F.2d 1034 (5th Cir. 1975); *Coffey v. United States*, 387 F. Supp. 539, 540 (D. Conn. 1975) (quoting *Nichols v. United States*, 236 F. Supp. 260, 263 (N.D. Miss. 1964)).

The plaintiffs here only offered a conclusory allegation that "the defendant, its agents, servants and employees assigned Ojeda to the area . . . with notice or knowledge of Ojeda's criminal and perverted propensities and tendencies . . ." and provided no factual basis for this conclusion. They did not state facts indicating that Ojeda had committed past offenses or manifested previous aberrant behavior that his employers should have detected. This case, therefore, is "the classic case of an intentional

assault and battery except for the conclusory allegation the Government knew or should have known that the postal clerk had 'malicious propensities' ", *Gibson*, *supra*, 457 F.2d at 1396, and falls clearly within the ambit of § 2680(h). We are forced to conclude that the plaintiffs have not alleged facts supporting the conclusion that their negligence claim represents a "belief formed after reasonable inquiry [that] it is well grounded in fact" as required by Fed. R. Civ. P. 11. The allegation of negligence therefore appears to be based on pure speculation. Otherwise the essential facts would have been alleged. Courts have not countenanced such attempts to transform assault and battery claims into negligence actions. *See Lambertson*, *supra*, 528 F.2d at 444; *Gaudet*, *supra*, 517 F.2d at 1035; *Blitz*, *supra*, 328 F.2d at 599.

Lastly, appellants maintain that § 2680(h) does not apply because they hope to prove that the assailant, Ojeda, was unable to form the intent necessary to commit the tort of assault and battery. *See Moffitt v. United States*, 430 F. Supp. 34, 37-38 (E.D. Tenn. 1976); *Albicocco v. Nicoletto*, 11 A.D.2d 690, 204 N.Y.S.2d 566 (1960), *aff'd*, 9 N.Y.2d 920, 217 N.Y.S.2d 91 (1961). This claim, which borders on the frivolous, must be rejected. Not only did the appellants fail to provide facts supporting the contention that the sexual attack was not an assault, but the complaint did not even contain conclusory allegations raising this issue. This contention therefore does not alter our conclusion that the essence of the claim arises out of assault and battery.

Although appellants argue that we should follow "sound policy considerations" urged in support of permitting the suit, this contention is properly addressed to Congress, not to this court. *See Kosak*, *supra*, 465 U.S. at

862. We accordingly affirm for lack of subject matter jurisdiction the judgment of the district court dismissing the complaint.

PRATT, *Circuit Judge*, dissenting:

I dissent and would hold the government liable for the negligence of its employees alleged in this case. The majority has barred this claim by six year old Melissa Johnson, who was sexually molested in her own neighborhood by a postal worker on his rounds, as one "arising out of an assault and battery". 28 U.S.C. § 2680(h). In doing so, the opinion neglects the facts, deemed to be true here, that it was a government employee who assigned the postal worker, Ojeda, as a letter carrier in Melissa's residential neighborhood with knowledge of his perverted propensities and tendencies, that Ojeda "on various occasions * * * sexually molested and sodomized" Melissa, and that Ojeda's superiors were negligent in hiring, assigning, and supervising him.

In general terms, the Federal Tort Claims Act ("FTCA") waived the government's historic sovereign immunity and provided that the United States shall be liable for the negligent acts of any of its employees "in the same manner and to the same extent as a private individual under like circumstances". 28 U.S.C. § 2672, 2674. The Supreme Court has repeatedly rejected a policy of strict construction for this act and has held that it should be construed generously so as to accomplish congress's purpose and policy in waiving an archaic immunity, giving due regard, of course, to the statutory exceptions to that policy. *United States v. Aetna Surety*

Co., 338 U.S. 366, 383 (1949); *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 & n.3 (1957); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951).

Specifically at issue here is whether the exception in section 2680(h) of claims arising out of assault and battery should bar a claim based on the "negligence", not of the assaulter, as in *Lambertson v. United States*, 528 F.2d 441 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976); *Blitz v. Boog*, 328 F.2d 596 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964); and *Gaudet v. United States*, 517 F.2d 1034 (5th Cir. 1975), all relied upon in the majority opinion, but of another government employee who was responsible for hiring, assigning, and supervising the assaulter.

Prior to this case the issue was open in this circuit. *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954), established that § 2680(h) did not retain governmental immunity against a claim for injuries arising from an assault and battery by one inmate of a government hospital against another, since the government had negligently failed to perform its duty of supervision. The majority here, as have some other courts, *e.g.*, *Collins v. United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966), interpret Judge (later Justice) Harlan's example postulated in *Panella*, 216 F.2d at 624, as authority for barring any suit involving an assault by a government employee. But Judge Harlan's view does not seem to have been so restrictive. What was fatally missing, in his view, from his hypothecated claim based on an assault committed by a government employee, was conduct whose essence was negligence. But his example did not consider the possibility of negligent supervision, and nothing in his analysis requires the extension of § 2680(h) to encompass negligent supervisory conduct.

The scope of section 2680(h)'s exemption also remains an open issue in the Supreme Court. While the problem was squarely presented last term in *Shearer v. United States*, ____ U.S. ____, 105 S. Ct. 3039 (1985), the expansive reading of the § 2680(h) exemption strongly urged by Chief Justice Burger, and now adopted by the majority in this court, could not entice the support of a majority of the Supreme Court, and the case was disposed of on other grounds.

In my view, a proper interpretation of the FTCA, consistent with its broad and remedial purpose, would be to hold the government liable, as would be a private person, when its supervisors negligently hire an assaultive employee, assign him to an area of temptation, and negligently fail to foresee and prevent the harm he is likely to inflict on the public. In practical terms, liability in such a situation would create no problems that are distinguishable from many other claims for which the government routinely is held liable. Claims for negligent supervision are no more prone to exaggeration and no more difficult to defend than most automobile accidents; the absence of a jury leaves the case under the firm control of a federal district judge; and punitive damages are not available, 28 U.S.C. § 2674. In short, on this issue I agree with the majority opinion of the third circuit in *Shearer v. United States*, 723 F.2d 1102, 1107-08 (3rd Cir. 1983), that the intentional tort exclusion of section 2680(h) was not intended to apply to a case of this type.

One other point in the majority opinion requires comment: the pleading burden the majority would impose on a plaintiff may well prove to be insurmountable. Pointing to plaintiffs' allegations that the defendant assigned Ojeda with notice or knowledge of his perverted propen-

sities, the opinion notes that there is no factual basis for this "conclusion". The opinion notes that the complaint does not state facts indicating that Ojeda had "committed past offenses or manifested previous aberrant behavior that his employers should have detected." And the majority are "forced to conclude" that the claim does not meet the requirements of Fed. R. Civ. P. 11, and is based on "pure speculation".

Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda's personnel file, is in the government's control, but it usually would be regarded as quasi-confidential and unavailable to an outsider. As a practical matter, therefore, plaintiffs' attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.

Further, the strict pleading requirement suggested by the majority opinion ignores Rule 9 of the Federal Rules of Civil Procedure. Under Rule 9(b), while averments of fraud or mistake must be stated "with particularity", the rule specifically permits malice, intent, and the state of mind at issue here—knowledge—to be "averred generally."

Finally, even the majority acknowledges that the type of conduct charged to Ojeda "may be repetitive", sufficiently so to have "normally prompted an inquiry by the

postal service into possible prior incidents." Opinion, page 7. The experience behind that observation readily translates to judicial notice and in my view, at least, when coupled with the fact of repeated assaults and continued assignment of Ojeda to a residential neighborhood, provides a sufficient good-faith basis for this complaint of negligent supervision of this postal worker to satisfy the requirements of Rule 11.

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of April, one thousand nine hundred and eighty-six

PRESENT: HON. WALTER R. MANSFIELD,
HON. AMALYA L. KEARSE,
HON. GEORGE C. PRATT
CIRCUIT JUDGES

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs-Appellants

-against-

Docket No. 84-6335

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Eastern District of New York, and was argued by counsel,

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. SMITH,
Clerk

/s/ Edward J. Guardaro,
by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of May, one thousand nine hundred and eighty-six.

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

Docket No. 84-6335

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants Johnson et al,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

84-C-1406

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIE, United States Attorney
(Kevin P. Simmons, Assistant United States Attorney, of counsel)
Brooklyn, New York
for defendants

NICKERSON, District Judge

Plaintiffs filed this complaint pursuant to the Federal Tort Claims Act (the Act), 28 U.S.C. §1346(b), alleging that the negligent supervision of government employees caused their injuries. Defendant brings this motion to dismiss and for summary judgment pursuant to Rules 12 and

56 of the Federal Rules of Civil Procedure on grounds of sovereign immunity. Because it lacks subject matter jurisdiction, the court does not reach the merits of defendant's motion.

The Act permits suits against the government for certain torts committed by government employees acting within the scope of their employment. 28 U.S.C. §1346(b). However, the Act requires the presentation of a claim to the appropriate federal agency and a final denial of that claim as a prerequisite to starting an action in federal court. 28 U.S.C. §2675(a).

Plaintiffs filed a complaint on Standard Form 95 with the United States Postal Service. Their complaint alleged that because of acts occurring on "6/3/82 and various dates prior thereto" the plaintiffs suffered personal injuries. Paragraph 11 of Standard Form 95 asks for a description of the accident including "all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof."

Plaintiffs completed Paragraph 11 as follows: "Melissa Johnson was sexually molested, assaulted, and, on information and belief, sodomized and threatened by Postman Luis Ojeda. Barbara Johnson sustained damage for medical and psychological treatment and loss of services."

The Postal Service denied plaintiffs' claim, first, because the incident described "occurred while Mr. Ojeda was acting outside the scope of his employment." Second, the agency denied the claim stating that:

> The incident you describe as the basis of your claim is an assault and battery. While Congress has generally waived the Government's immunity for certain wrongful acts of its employees commited (sic) within the cope of their employment, Congress has specifically provided, in 28 U.S.C. 2680(h), that the Government's immunity from suit and from considering claims for personal injury has not been waived for any claim arising out of an assault and battery.

Plaintiffs then brought this action. Plaintiffs' complaint does not allege assault and battery. While it alleges

that Ojeda sexually molested, sodomized and threatened the plaintiff, the theory of this complaint is that defendant had "notice or knowledge of Ojeda's criminal and perverted propensities" and that defendant's negligence in employing, assigning and supervising Ojeda caused plaintiffs' injuries.

Section 2675(a)'s requirement that claimant present their tort claims to the relevant federal agency before suing in federal court is jurisdictional and cannot be waived. Keene Corp. v. United States, 700 F. 2d 836, 841 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1983). Filing an administrative complaint before filing a civil suit permits the agency best informed about the activity which gave rise to the claim to investigate, evaluate and possibly settle a claim without need for litigation. See S. Rep. No. 1327, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. Code Cong. & Ad. News 2515, 2517. This purpose requires that the claim bring "to the Government's attention facts sufficient to enable

it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." Rise v. United States, 630 F. 2d 1068, 1071 (5th Cir. 1980). The burden is on the claimant to provide adequate factual details of the nature of the claim at the agency level. See Keene, 700 F.2d at 842. Because the act waives sovereign immunity, this presentment requirement must be strictly adhered to. Id. at 841. Provided the administrative complaint fairly apprises "the Government of the facts leading to the claimant's injury, new theories of why those facts constitute tortious conduct can be included in a federal court complaint." Rise, 630 F.2d at 1071.

Plaintiffs' administrative complaint made no factual allegations even hinting of negligent supervision. It alleged only that Ojeda assaulted, threatened and molested the infant plaintiff. It did not allege that anyone other than Ojeda might be culpable for their injuries. Nor did it alleged that any

defendants knew, or had reason to know, of Ojeda's propensities, or that any defendant failed to exercise reasonable care in supervising or continuing to employ Ojeda. Yet these are factual elements necessary to a claim of negligent supervision under the relevant New York law. See, e.g., McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947). Section 2675(a)'s presentment requirement means that a plaintiff cannot "present one claim to the agency and then maintain suit on the basis of a different set of facts." Dundon v. United States, 559 F. Supp. 469, 476 (E.D.N.Y. 1983).

This action is distinguishable from those in which courts have exercised jurisdiction even though the federal complaints raised different theories of liability from those suggested by the administrative complaints. In those cases, the administrative complaints set forth facts sufficient to warrant agency investigations, which in turn should have produced evidence to put the

agency on "constructive notice" of other theories of liability. See, e.g., Rise, 630 F.2d 1068; Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980).

In this action, it is likely that plaintiffs' administrative complaint never triggered an agency investigation since it alleged only that one government employee committed an assault and battery. Indeed, in denying plaintiffs' claim the agency merely cited 28 U.S.C. §2680(h), which specifically provides that the government has not waived its immunity from suit for claims arising out of assault and battery.

Because plaintiffs failed to comply with the presentment requirement of Section 2675(a), this court lacks jurisdiction to entertain the complaint now. See, e.g., Bush v. United States, 703 F.2d 491, 495 (11th Cir. 1983) (court lacks jurisdiction over claim of lack of informed consent since administrative complaint alleged only negligent medical

treatment); Heaton v. United States, 383 F. Supp. 589 (S.D.N.Y. 1974) (court lacks jurisdiction over wife's claim for loss of services since administrative complaint alleged only husband's personal injury). The complaint is dismissed.

So ordered.

Dated: Brooklyn, New York
October 10, 1984

/s/ Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

CV 84-1406 (EHN)

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on October 12, 1984, dismissing the complaint, it is

ORDERED and ADJUDGED that plaintiffs recover nothing of the defendants and the complaint is dismissed.

/s/ Robert C. Heinemann
Robert C. Heinemann
Clerk of Court

Dated: Brooklyn, New York
October 15, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

84 C 1406

MEMORANDUM AND ORDER

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIE, United States Attorney
(Kevin P. Simmons, Assistant United States Attorney, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

By order dated October 10, 1984 the court dismissed the complaint for lack of jurisdiction. Plaintiff filed a notice of appeal and, at the same time, a notice of motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Al-

though the appeal was initially dismissed on January 4, 1985 the Court of Appeals for the Second Circuit granted plaintiff's motion to restore the appeal nunc pro tunc.

The filing of a timely notice of appeal divests the court of jurisdiction to entertain a Rule 60(b) motion. Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981); Weiss v Hunna, 312 F.2d 711, 713 (2d Cir. 1963), cert. denied, 374 U.S. 853 (1963). Accordingly, plaintiffs' motion for relief from judgment is denied for lack of jurisdiction. So ordered.

DATED: Brooklyn, New York
February 11, 1985

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

SUPPORTING AFFIDAVIT

1984 Civil 1406 (Nickerson,J)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD FRANK, being duly sworn, deposes and says:

1 I represent the plaintiff Melissa Johnson in this action.

2. A day or two after I received a copy of the Court's opinion dismissing the complaint in this matter, I advised the plaintiff's mother of the Court's actions. I did not go into detail with her as to the grounds for the dismissal, though we agreed to get together as soon

as possible so that I could explain to her in detail the reasons for the Court's action.

3. During my early interviews with the infant plaintiff's mother, she told me that the District Attorney had been in touch with her about the actions of the postal employee who had assaulted the infant plaintiff. She told me that an assistant district attorney had told her that the postal employee had prior incidents of this nature on his record, and that the Postal Service was aware of these prior incidents. Thus, it is alleged in the Complaint, on information and belief, that the Postal Service was on notice of its employee's propensities.

4. I was not aware during my preparation of this case, that, indeed, the Postal Service had actually investigated the incident. Not until I spoke with plaintiff's mother last week did she tell me for the first time that there had been a Postal Service investigation. I read her portions of the Court's opinion dismissing the complaint

and Mrs. Johnson advised me for the first time that a Postal Service inspector or investigator met with her and her daughter, took statements from both of them and told her he would fully investigate the nature and circumstances surrounding the alleged incident. According to Mrs. Johnson, it simply never occurred to her before to draw a distinction between the criminal investigation, about which she told me, and the agency investigation, which she never mentioned until last week.

/s/ RICHARD FRANK
RICHARD FRANK

Sworn to before me this
7th day of November, 1984

/s/ Carmen Superville
Carmen Superville
Notary Public, State of New York
No. 24-9250025
Qualified in Kings County
Commission Expires March 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

PLAINTIFF DEMANDS A JURY TRIAL

Civ. No. 84-1406

COMPLAINT

Plaintiffs by their attorneys, Richard Frank, P.C., complaining of the above-named defendant, respectfully show to this Court and allege:

JURISDICTION

1. Jurisdiction herein is conferred by Title 28 U.S.C., §1346(b) and §2674, the claim consisting of negligence by employees of the defendant in the course and scope of such employment.

2. Prior hereto, and on or about October 13, 1983, plaintiffs' claims

were presented to the United States Postal Service, and were denied on or about January 6, 1984.

FIRST CLAIM

3. On June 3, 1982 and for a period of time prior thereto, the defendant employed one Luis Ojeda as a postman.

4. On June 3, 1982 and prior thereto, Ojeda was assigned as a letter carrier to an area including 3801 Avenue L, Brooklyn, New York.

5. On June 3, 1982 and prior thereto, the defendant, its agents, servants and employees assigned Ojeda to the area including 3801 Avenue L, Brooklyn, New York, with notice or knowledge of Ojeda's criminal and perverted propensities and tendencies, and further with notice or knowledge of the residential nature of the said area.

6. On various occasions up to and including June 3, 1982, Ojeda sexually molested, sodomized and on information and belief, threatened plaintiff Melissa Johnson, an infant lawfully residing at 3801 Avenue L, Brooklyn, New York.

7. The foregoing was caused by the carelessness, recklessness and negligence of the defendant, its agents, servants and/or employees in the employment, supervision and assignment of Ojeda.

8. As a result of the foregoing, the plaintiff Melissa Johnson has sustained serious personal injuries, to her damage in the amount of Five Million ($5,000,000.00) Dollars.

SECOND CLAIM

9. At all times herein mentioned, plaintiff Barbara Johnson was and is the mother and natural guardian of plaintiff Melissa Johnson and entitled to her services and society.

10. As a result of the carelessness, recklessness and negligence of the defendant, this plaintiff has been deprived of the services and society of the plaintiff Melissa Johnson and has necessarily incurred medical and psychiatric expenses, all to her damage in the amount of One Million ($1,000,000.00) Dollars.

WHEREFORE, judgment is demanded against the above named defendant on the First Claim on behalf of the infant plaintiff in the sum of Five Million ($5,000,000.00) Dollars and on the Second Claim on behalf of the plaintiff Barbara Johnson in the sum of One Million ($1,000,000.00) Dollars, together with the costs and disbursements of this action.

RICHARD FRANK, P.C.
Attorneys for Plaintiff

BY: DAVID M. SCHULLER
DAVID M. SCHULLER
350 Madison Avenue
New York, New York 10017

Telephone: 212-867-3800

86-114 (2)

No. ____

Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MELISSA JOHNSON, an infant, by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

RICHARD FRANK*
KATHLEEN PERATIS
Attorneys for Petitioners
330 Madison Avenue
New York, New York 10017
Telephone: (212) 867-3800

**Counsel of Record*

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of April, one thousand nine hundred and eighty-six.

PRESENT: HON. WALTER R. MANSFIELD,

HON. AMALYA L. KEARSE,

HON. GEORGE C. PRATT

CIRCUIT JUDGES

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually

Docket No. 84-6335

Plaintiffs-Appellants

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel,

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. SMITH,
Clerk

/s/ Edward J. Guardaro,
by: Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of May, one thousand nine hundred and eighty-six.

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs-Appellants,

-against-

UNITED SATES OF AMERICA,

Defendant-Appellee.

Docket No. 84-6335

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants Johnson et al,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

CV 84-1406 (EHN)

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIER, United States Attorney
(Kevin P. Simmons, Assitant United States Attorney, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

Plaintiffs filed this complaint pursuant to the Federal Tort Claims Act (the Act), 28 U.S.C. §1346(b), alleging that

the negligent supervision of government employees caused their injuries. Defendant brings this motion to dismiss and for summary judgment pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure on grounds of sovereign immunity. Because it lacks subject matter jurisdiction the court does not reach the merits of defendant's motion.

The Act permits suits against the government for certain torts committed by government employees acting within the scope of their employment. 28 U.S.C. §1346(b). However, the Act requires the presentation of a claim to the appropriate federal agency and a final denial of that claim as a prerequisite to starting an action in federal court. 28 U.S.C. §2675(a).

Plaintiffs filed a complaint on Standard Form 95 with the United States Postal Service. Their complaint alleged that because of acts occurred on "6/3/82 and varioús dates prior thereto" the plaintiffs suffered personal injuries. Paragraph 11 of Standard Form 95 asks for a description of the accident including "all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and th cause thereof." Plaintiffs completed Paragraph 11 as follows: "Melissa Johnson was sexually molested, assaulted, and, on information and belief, sodomized and threatened by Postman Luis Ojeda. Barbara Johnson sustained damage for medical and psychological treatment and loss of services."

The Postal Service denied plaintiffs' claim, first, because the incident described "occurred while Mr. Ojeda was acting outside the scope of his employment." Second, the agency denied the claim stating that:

> The incident you describe as the basis of your claim is an assault and battery. While Congress has generally waived the Government's immunity for certain wrongful acts of its employees commited (sic) within the scope of their employment, the Congress has specifically provided, in 28 U.S.C. 2680(h), that the Government's immunity from suit and from considering claims for personal injury has not been waived for any claim arising out of an assault and battery.

Plaintiffs then brought this action. Plaintiffs' complaint does not allege assault and battery. While it alleges that Ojeda sexually molested, sodomized and threatened the plaintiff, the theory

of this complaint is that defendant had "notice or knowledge of Ojeda's criminal and perverted propensities" and that defendant's negligence in employing, assigning and supervising Ojeda caused plaintiff's injuries.

Section 2675(a)'s requirement that claimant present their tort claims to the relevant federal agency before suing in federal court is jurisdictional and cannot be waived. Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1983). Filing an administrative complaint before filing a civil suit permits the agency best informed about the activity which gave rise to the claim to investigate, evaluate and possibly settle a claim without need for litigation. See. S. Rep. No. 1327, 89th Cong., 2d Sess. 7, reprinted in

1966 U.S. Code Cong. & Ad. News 2515, 2517. This purpose requires that the claim bring "to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." Rise v. United States, 630 F. 2d 1068, 1071 (5th Cir. 1980). The burden is on the claimant to provide adequate factual details of the nature of the claim at the agency level. See Keene, 700 F. 2d at 842. Because the act waives sovereign immunity, this presentment requirement must be strictly adhered to. Id. at 841. Provided the administrative complaint fairly apprises "the Government of the facts leading to the claimant's injury, new theories of why those facts constitute tortious

conduct can be included in a federal court complaint." Rise, 630 F.2d at 1071.

Plaintiffs' administrative complaint made no factual allegations even hinting of negligent supervision. It alleged only that Ojeda assaulted, threatened and molested the infant plaintiff. It did not allege that anyone other than Ojeda might be culpable for their injuries. Nor did it allege that any defendants knew, or had to reason to know, of Ojeda's propensities, or that any defendnat failed to exercise reasonable care in supervising or continuing to employ Ojeda. Yet these are factual elements necessary to a claim of negligent supervision under the relevant New York law. See, e.g., McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947). Section 2675(a)'s presentment requirement means that a plaintiff

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cannot "present one claim to the agency and then maintain suit on the basis of a different set of facts." Dundon v. United States, 559 F. Supp. 469, 476 (E.D.N.Y. 1983).

This action is distinguishable from those in which courts have exercised jurisdiction even through the federal complaints raised different theories of liability from those suggested by the administrative complaints. In those cases, the administrative complaints set forth facts sufficient to warrant agency investigations, which in turn should have produced evidence to put the agency on "constructive notice" of other theories of liability. See, e.g., Rise, 630 F.2d 1068; Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980).

In this action, it is likely that plaintiffs' administrative complaint never triggered an agency investigation since it alleged only that one government employee committed an assault and battery. Indeed, in denying plaintiffs' claim the agency merely cited 28 U.S.C. §2680(h), which specifically provides that the government has not waived its immunity from suit for claims arising out of assault and battery.

Because plaintiffs failed to comply with the presentment requirement of Section 2675(a), this court lacks jurisdiction to entertain the complaint now. See, e.g., Bush v. United States, 703 F.2d 491, 495 (11th Cir. 1983) (court lacks jurisdiction over claim of lack of informed consent since administrative complaint alleged only negligent medical treatment); Heaton v. United

States, 383 F. Supp. 539 (S.D.N.Y. 1974) (court lacks jurisdiction over wife's claim for loss of services since administrative complaint alleged only husband's personal injury). The complaint is dismissed.

So ordered.

Dated: Brooklyn, New York
October 10, 1984

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUDGMENT

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

CV 84-1406 (EHN)

against

UNITED STATES OF AMERICA,

Defendant.

A memorandum and order of Honorable Eugene H. Nickerson, United States District Judge, having been filed on October 12, 1984, dismissing the complaint, it is

ORDERED and ADJUDGED that plaintiffs recover nothing of the defendants

and the complaint is dismissed.

/s/ Robert C. Heinemann
Robert C. Heinemann

DATED:

Brooklyn, New York
October 15, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER

CV 84-1406 (EHN)

RICHARD FRANK, P.C.
New York, New York
for plaintiffs

RAYMOND J. DEARIE, United States Attorney
(Kevin P. Simmons Assistant United States Attorney, of counsel)
Brooklyn, New York
for defendant

NICKERSON, District Judge

By order dated October 10, 1984 the court dismissed the complaint for lack of jurisdiction. Plaintiff filed a

notice of appeal and, at the same time, a notice of motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Although the appeal was initially dismissed on January 4, 1985 the Court of Appeals for the Second Circuit granted plaintiff's motion to restore the appeal nunc pro tunc.

The filing of a timely notice of appeal divests the court of jurisdiction to entertain a Rule 60(b) motion. Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981); Weiss v. Hunna, 312 F.2d 711, 713 (2d Cir. 1963), cert. denied, 374 U.S. 853 (1963). Accordingly, plaintiffs' motion for

relief from judgment is denied for lack of jurisdiction. So ordered.

DATED: Brooklyn, New York
February 11, 1985

/s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and nagural guardian and BARBARA JOHNSON,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

SUPPORTING AFFIDAVIT

1984 Civil 1406 (Nickerson,J)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD FRANK, being duly sworn, deposes and says:

1. I represent the plaintiff Melissa Johnson in this action.

2. A day or two after I received a copy of the Court's opinion dismissing the complaint in this matter, I advised the plaintiff's mother of the Court's actions. I did not go into detail with

her as to the grounds for the dismissal, though we agreed to get together as soon as possible so that I could explain to her in detail the reasons for the Court's action.

3. During my early interviews with the infant plaintiff's mother, she told me that the District Attorney had been in touch with her about the actions of the postal employee who had assaulted the infant plaintiff. She told me that an assistant district attorney had told her that the postal employee had prior incidents of this nature on his record, and that the Postal Service was aware of these prior incidents. Thus, it is alleged in the Complaint, on information and belief, that the Postal Service was on notice of its employees' propensities.

4. I was not aware during my preparation of this case, that, indeed, the Postal Service had actually investigated the incident. Not until I spoke with plaintiff's mother last week did she tell me for the first time that there had been a Postal Service investigation. I read her portions of the Court's opinion dismissing the complaint and Mrs. Johnson advised me for the first time that a Postal Service inspector or investigator met with her and her daughter, took statements from both of them and told her he would fully investigate the nature and circumstances surrounding the alleged incident. According to Mrs. Johnson, it simply never occurred to her before to draw a distinction between the criminal investi-

gation, about which she told me, and the agency investigation, which she never mentioned until last week.

/s/ Richard Frank
RICHARD FRANK

Sworn to before me this

7th day of November, 1984

/s/ Carmen Superville
Carmen Superville
Notary Public, State of New York
No. 24-8250025
Qualified in Kings County
Commission Expires March 30, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA JOHNSON, an infant by BARBARA JOHNSON, her mother and natural guardian and BARBARA JOHNSON, individually,

Plaintiffs

against

UNITED STATES OF AMERICA,

Defendant

PLAINTIFF DEMANDS A JURY TRIAL

Civ. No. 84-1406

COMPLAINT

Plaintiffs by their attorneys, Richard Frank, P.C., complaining of the above-named defendant, respectfully show to this Court and allege:

JURISDICTION

1. Jurisdiction herein is conferred by Title 28 U.S.C., §1346(b) and §2674, the claim consisting of negligence by employees of the defendant in the course and scope of such employment.

2. Prior hereto, and on or about October 13, 1983, plaintiffs' claims were presented to the United States Postal Service, and were denied on or about January 6, 1984.

FIRST CLAIM

3. On June 3, 1982 and for a period of time prior thereto, the defendant employed one Luis Ojeda as a postman.

4. On June 3, 1982 and prior thereto, Ojeda was assigned as a letter carrier to an area including 3801 Avenue L, Brooklyn, New York.

5. On June 3, 1982 and prior thereto, the defendant, its agents, servants and employees assigned Ojeda to the area including 3801 Avenue L, Brooklyn, New York, with notice or knowledge of Ojeda's criminal and perverted propensities and tendencies, and further with notice or knowledge

of the residential nature of the said area.

6. On various occasions up to and including June 3, 1982, Ojeda sexually molested, sodomized and on information and belief, threatened plaintiff Melissa Johnson, an infant lawfully residing at 3801 Avenue L, Brooklyn, New York.

7. The foregoing was caused by the carelessness, recklessness and negligence of the defendant, its agents, servants and/or employees in the employment, supervision and assignment of Ojeda.

8. As a result of the foregoing, the plaintiff Melissa Johnson has sustained serious personal injuries, to her damage in the amount of Five Million ($5,000,000.00) Dollars.

SECOND CLAIM

9. At all times herein mentioned, plaintiff Barbara Johnson was and is the mother and natural guardian of plaintiff Melissa Johnson and entitled to her services and society.

10. As a result of the carelessness, recklessness and negligence of the defendant, this plaintiff has been deprived of the services and society of the plaintiff Melissa Johnson and has necessarily incurred medical and psychiatric expenses, all to her damage in the amount of One Million ($1,000,000.00) Dollars.

WHEREFORE, judgment is demanded against the above named defendant on the First Claim on behalf of the infant plaintiff in the sum of Five Million

($5,000,000.00) Dollars and on the Second Claim on behalf of the plaintiff Barbara Johnson in the sum of One Million ($1,000,000.00) Dollars, together with the costs and disbursements of this action.

RICHARD FRANK, P.C.
Attorneys for Plaintiff

BY: DAVID M. SCHULLER
DAVID M. SCHULLER
350 Madison Avenue
New York, New York 10017

Telephone: 212-867-3800

Supreme Court, U.S.
FILED
SEP 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-114

In the Supreme Court of the United States

OCTOBER TERM 1986

MELISSA JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TPP

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No. 84-194 (June 27, 1985) 2, 3, 4

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Statute:

Federal Tort Claims Act:

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28 U.S.C. 2680(h) 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM 1986

No. 86-114

MELISSA JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States is liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, for a sexual assault committed by a letter carrier employed by the United States Postal Service. This contention is without merit, for the FTCA preserves sovereign immunity for "[a]ny claim arising out of assault [or] battery" by a federal employee other than an "investigative or law enforcement officer." 28 U.S.C. 2680(h).[1]

---

[1]An issue similar to that presented here is raised in the petition for a writ of certiorari filed in *Metz* v. *United States*, No. 86-189 (filed Aug. 5, 1986), an FTCA action for invasion of privacy and intentional infliction of emotional distress allegedly resulting from the arrest and detention of the plaintiff.

1. In June 1982 a mailman sexually assaulted five-year-old Melissa Johnson.[2] After the Postal Service denied their administrative claim, petitioners (Melissa and her mother) filed this action seeking damages from the United States. Petitioners contend that the Postal Service negligently employed and supervised the mailman (Pet. App. A44-A45). The United States moved to dismiss for lack of subject matter jurisdiction, asserting that it had not waived sovereign immunity for causes of action "arising out of" assault or battery. 28 U.S.C. 2680(h).

The district court dismissed on the ground that the claim raised by the complaint had not been submitted to the Postal Service as required by 28 U.S.C. 2675(a). The court pointed out that petitioners' administrative claim did not mention facts "even hinting of negligent supervision," or that anyone other than the mailman "might be culpable for the[] injuries" (Pet. App. A33). The court therefore held that petitioners had "failed to comply with the presentment requirement of Section 2675(a)" (*id.* at A35).

The court of appeals, contrary to the district court, held that the administrative claim was sufficient to put the Postal Service on notice of the negligent supervision claim (Pet. App. A5-A9). However, the court of appeals affirmed the dismissal on the ground that the district court lacked jurisdiction because the government had not waived sovereign immunity with respect to claims arising out of assault and battery. The court agreed with Chief Justice Burger and three other Justices who concluded in *United States* v. *Shearer*, No. 84-194 (June 27, 1985), that a plaintiff " 'cannot avoid the reach of § 2680(h) by framing her complaint

---

[2]Postal Service files show that the mailman entered a plea of guilty in New York State court to sexual abuse in the first degree and was sentenced to a term of imprisonment of one to three years.

in terms of negligent failure to prevent the assault and battery' " (Pet. App. A10 (quoting *Shearer*, slip op. 2-3)).[3] The court of appeals here concluded that "the plain language of § 2680(h) prohibits claimants from clothing assault and battery actions in the garb of negligence by claiming negligent failure to prevent the attack" (Pet. App. A10).[4]

2. For the reasons stated by Chief Justice Burger in *Shearer*, the court of appeals' decision is correct. "Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery" (slip op. 3 (emphasis in original)). In this case, as in *Shearer*, "[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of [the damage] and, consequently, the basis of [the] claim" (*id.* at 2). See also *Kosak* v. *United States*, 465 U.S. 848 (1984) (28 U.S.C. 2680(c) exception for claims arising in respect of detention of goods extends to claims for destruction during detention); *Block* v. *Neal*, 460 U.S. 289, 297 (1983) (28 U.S.C. 2680(h) exception for claims arising out of misrepresentation does not bar claims for negligent supervision of construction of home where "the Government's misstatements are not essential to plaintiff's negligence claim").

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[3]Four Justices did not join the portion of Chief Justice Burger's opinion in *Shearer* addressing Section 2680(h), and the remaining Justice did not participate in the decision. The Court held in *Shearer* that the plaintiff's claim was barred by the *Feres* doctrine, which provides that service members may not recover under the FTCA for injuries incurred incident to military service.

[4]Judge Pratt dissented. He would have held that "a proper interpretation of the FTCA, consistent with its broad and remedial purpose, would be to hold the government liable, as would be a private person, when its supervisors negligently hire an assaultive employee, assign him to an area of temptation, and negligently fail to foresee and prevent the harm he is likely to inflict on the public" (Pet. App. A22).

As we explained in our petition in *Shearer* (at 7-9),[5] the Third Circuit's decision in that case (723 F.2d 1102 (1983))—that a plaintiff may bring a suit alleging negligent failure to supervise a government employee who committed an intentional tort—was inconsistent with the decisions of every other court of appeals that had considered the issue. Since this Court's decision in *Shearer*, the Fifth and Sixth Circuits, like the court below, have concluded that Section 2680(h) bars claims alleging negligent failure to supervise a government employee. *Garcia* v. *United States*, 776 F.2d 116 (5th Cir. 1985); *Satterfield* v. *United States*, 788 F.2d 395, 399-400 (6th Cir. 1986).[6] No court, other than the Third Circuit in its decision in *Shearer* (which this Court reversed on other grounds), has reached a contrary conclusion.[7] Accordingly, there is no warrant for review by this Court.

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[5]We are serving a copy of each of our briefs in *Shearer* upon counsel for petitioner.

[6]In addition, the Second Circuit recently followed its decision in this case in *Miele* v. *United States*, No. 85-6403 (Sept. 3, 1986).

[7]The only court of appeals decisions petitioners cite (Pet. 9) in support of their claim other than the Third Circuit's decision in *Shearer*—*Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), and *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966)—are clearly distinguishable. As we explained in our petition in *Shearer* (at 12-13 n.6) and our reply brief at the petition stage (at 1-2), those cases rest on the principle that when the government undertakes a special responsibility for protecting the public from a person known to be dangerous, such as the juvenile delinquent in *Gibson* or the dangerous mental hospital patient in *Underwood*, it must exercise due care in discharging that responsibility. No such special responsibility was undertaken here. Moreover, the Fifth Circuit "retreat[ed] from *Underwood*" in its recent decision in *Garcia* in light of Chief Justice Burger's opinion in *Shearer* (776 F.2d at 118).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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